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## The Marital Privileges in Washington Law: Spouse Testimony and Marital Communications

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THE MARITAL PRIVILEGES IN  
WASHINGTON LAW: SPOUSE TESTIMONY  
AND MARITAL COMMUNICATIONS

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## Marital Privileges

### I. INTRODUCTION

The coexistence of the spouse testimony and marital communications privileges spawns confusion. Although they are two distinct rules of evidence, they tend to coalesce in the legal mind because both privileges arise from the marriage relationship. The privileges are fundamentally different: the testimony privilege prohibits all testimony by the current spouse of a party if that party objects; the communications privilege prohibits testimony as to confidential interspousal communications, disallowing such testimony by the current or former spouse of the person who communicated if the latter objects. In addition to the problem of confusing the two privileges, the common practice of referring to the spouse testimony privilege as "spouse competency" leads to confusion between the testimony privilege and the spouse competency rule, which has long since been abandoned.

In Washington these difficulties are compounded by the form of the privilege statute. The two privileges are embodied in a single sentence<sup>1</sup> without any details as to their application. All specific rules have been laid down piecemeal by the courts. Consequently, the current Washington marital privilege law lacks cohesive structure and is often outdated and confusing. The anticipated adoption of the Proposed Washington Rules of Evidence based on the Federal Rules of Evidence will afford no relief; because the Federal Rules do not include privileges,<sup>2</sup> the Washington Judicial Council omitted privilege rules when it drafted the Proposed Washington Rules. This comment is an attempt to analyze and clarify Washington marital privilege law. Each privilege is presented against the backdrop of policy rationales.

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1. The statute provides:

A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by one to the other during marriage.

WASH. REV. CODE § 5.60.060(1) (1976).

2. Specific privileges were omitted from the Federal Rules of Evidence on the ground that they are substantive rules and therefore should be determined by state law. H.R. REP. NO. 650, 93d Cong., 2d Sess. 8-9, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7075, 7082-83. However, the Advisory Committee did propose a set of privilege rules which were approved by the United States Supreme Court. A spouse testimony but not a marital communications privilege was included in the proposed rules. See notes 116 & 117 and accompanying text *infra* (Committee's reasons for excluding marital communications privilege) and Part VI-B *infra* (the proposed federal marital privilege). The Washington Judicial Council could have incorporated the proposed federal privilege rules in the Washington Code or could have composed its own set of privilege rules.

This overview of the privileges is designed to facilitate their use and also to point out the great need for revision of the Washington law. In conclusion, two alternative approaches are presented as models for a revised set of Washington marital privileges.

## II. SPOUSE COMPETENCY

At common law, the spouse competency rule was an absolute prohibition of testimony by one spouse in favor of the other.<sup>3</sup> In contrast, the spouse testimony privilege operates primarily to prevent testimony by one spouse against the other, subject to the waiver of the party spouse.<sup>4</sup> This fundamental difference in legal effect accounts for the demise of the competency rule and the survival of the privilege. Many rationales supporting the competency rule were advanced,<sup>5</sup> but all were rejected when the manifest injustice of denying one spouse the chance to testify on behalf of the other became intolerable.

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3. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 66 (2d ed. E. Cleary 1972).

4. *Id.*

5. Testimony by one spouse on behalf of the other was originally excluded as incompetent because it was assumed that a testifying spouse would be biased due to self-interest. The rule emerged around 1628 when interest in general became a disqualification. 2 J. WIGMORE, EVIDENCE § 600 (3d ed. 1940). There was a pervasive early common law distrust of the intelligence of jurors. Only presumably honest witnesses were allowed to speak; consequently, any reason to believe that a witness might lie was grounds for disqualification. Such grounds included being a party, sharing interests with a party, having been convicted for a crime, or being devoid of religious belief. *Benson v. United States*, 146 U.S. 325, 336 (1892). Bias was not assumed in some relationships, such as father-son, master-servant. The marriage relationship was distinguished because at the time that the rule emerged there was legal identity of the spouses, *i.e.*, their interests were considered to be one and the same. 2 J. WIGMORE, *supra* § 600.

As interest became discredited as a ground for disqualification, alternative justifications were advanced for denying testimony by one spouse on the other's behalf. The practical effect of offering new rationales for the competency rule was to shield it from statutes which abrogated incompetency based solely on interest. *E.g.*, *United States v. Crow Dog*, 3 Dak. 106, 14 N.W. 437 (1882), *cert. granted on other grounds*, 109 U.S. 556 (1888). See 2 J. WIGMORE, *supra* § 619. The bias once attributed to interest was now ascribed to affection. This argument had little weight. The rejection of interest as a basis for disqualification amounted to a rejection of the idea that there should be a preliminary weeding out of potentially biased witnesses rather than leaving the believability of witnesses up to the jury.

The United States Supreme Court pointed out that whether the rationale was bias due to identity of interests or due to affection made little difference. "In either case, a refusal to permit the wife upon the ground of interest to testify on behalf of her husband, while permitting him, who has the greater interest, to testify for himself, presents a manifest incongruity." *Funk v. United States*, 290 U.S. 371, 381 (1933).

In favor of retaining the competency rule, it was argued that the marriage needed protection from the possibility of discord caused by one spouse refusing to testify for the other, and that the witness spouse needed protection from the dilemma of choosing be-

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In Washington there has been no statutory basis for spouse incompetency since 1877.<sup>6</sup> However, the spouse testimony privilege is routinely referred to as a competency rule.<sup>7</sup> Although "competent" is sometimes used as a synonym for "admissible," its technical meaning is much narrower. Incompetent evidence is always inadmissible; it is incompetent because it is too untrustworthy to be considered by the jury.<sup>8</sup> However, inadmissible evidence is often competent. Today no one doubts the fitness of a spouse's testimony for consideration by the jury, but the party spouse is granted the privilege of excluding this evidence; it is competent but inadmissible. Incompetency cannot be cured, but a privilege may be waived rendering the privileged evidence admissible.

The failure to distinguish clearly between competency and privilege has recently led to unnecessary doubts as to the status of the spouse testimony privilege. It has been erroneously suggested that Rule 6.12 of the Washington Criminal Rules for Superior Court, adopted by the Washington Supreme Court in 1973, abrogated the privilege in crimi-

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tween perjury, contempt of court, and marital discord arising out of a refusal to testify. Certainly the conviction of an innocent spouse would be more disturbing than the refusal of one spouse to testify on behalf of the other or the dilemma of the witness spouse. See 2 J. WIGMORE, *supra* § 601.

Although these same policy rationales were legitimate grounds for granting a privilege to block adverse testimony, see Part III-A *infra*, they were an inadequate justification for absolute prohibition of vindicating testimony. It made little sense to tell a wife that she could not testify to show the innocence of her husband because of society's interest in preserving her marriage and in protecting her from a hypothetical dilemma. Since the rule lacked any logical basis and its results were manifestly unfair, it was eventually abandoned.

6. 1877 Wash. Laws § 393 (current version at WASH. REV. CODE §§ 5.60.030-.050 (1976)). Interest is excluded as a ground for incompetency, with the exception of testimony of a witness's transaction with a person since deceased. WASH. REV. CODE § 5.60.030 (1976). Conviction of a crime is also excluded, although conviction may be shown to affect credibility and a person convicted of perjury is incompetent. WASH. REV. CODE § 5.60.040 (1976). The only other persons who are incompetent to testify are those who, at the time of examination, are intoxicated or of unsound mind and those who are under 10 years of age and appear to be incapable of offering reliable testimony. WASH. REV. CODE § 5.60.050 (1976). Spouse competency is not explicitly mentioned but is inferred from the exclusion of the marital relationship from the list of grounds for incompetency.

7. *E.g.*, 5 R. MEISENHOLDER, WASHINGTON PRACTICE § 164, at 165 (1965). See C. McCORMICK, *supra* note 3, § 66. Erroneous reference to the spouse testimony privilege as a competency rule is furthered by statutory wording. The section regarding the privilege, R.C.W. § 5.60.060, is included in the chapter titled "Witnesses—Competency." The section itself is titled "Who are disqualified—Privileged communications." It is clear, however, that the statute confers a privilege which can be waived and does not pronounce a disqualification.

8. See 2 J. WIGMORE, *supra* note 5, § 492. The very limited grounds for incompetency in Washington illustrate how extremely unreliable such testimony must be to qualify as incompetent. See note 6 *supra*.

nal cases.<sup>9</sup> Rule 6.12 provides that all persons shall be competent to testify, with the exception of those who are incapable at the time because of unsound mind, intoxication, or youth. The rule explicitly states, "This shall not affect any recognized privileges."<sup>10</sup> As the Washington Supreme Court has twice indicated,<sup>11</sup> the spouse testimony privilege is untouched by Rule 6.12. Confusion arises only because of a failure to recognize that spouse testimony is prohibited because it is privileged, not because it is incompetent. This misunderstanding of Rule 6.12 illustrates the importance of distinguishing between spouse competency and spouse privilege.

### III. SPOUSE TESTIMONY PRIVILEGE

#### A. Policy Rationales

The spouse testimony privilege prohibits the testimony of one spouse for or against the other without the consent of the party spouse.<sup>12</sup> The privilege is based on the sanctity and harmony of marriage<sup>13</sup> and is directed toward preservation of the marriage relationship before the court. It reflects the "natural repugnance" of the direct or indirect incrimination of one spouse by the other,<sup>14</sup> and protects the witness spouse from the dilemma of either committing perjury, being in contempt of court, or jeopardizing the marriage.<sup>15</sup>

#### B. The Marriage Requirement

The testimony privilege may be claimed in civil as well as criminal

9. 5 R. MEISENHOLDER, *supra* note 7, § 164 (Supp. 1975). The drafters of the Proposed Washington Rules of Evidence stated that there was confusion about the effect of the Supreme Court competency rule, citing Meisenholder. PROPOSED WASH. R. EVID. 601, Comment 601, Criminal Cases in Superior Court (1977). The drafters failed to indicate that the confusion stems from neglecting to distinguish competency from privilege. The Proposed Washington Rules of Evidence were drafted and approved by the Washington Judicial Council.

10. WASH. CRIM. R. SUPER. CT. 6.12(c).

11. *State v. Thompson*, 88 Wn. 2d 518, 564 P.2d 315 (1977); *Fortun v. McCrea*, 19 Wn. App. 7, 573 P.2d 815 (1978).

12. WASH. REV. CODE § 5.60.060(1) (1978), reproduced in note 1 *supra*.

13. *State v. Thorne*, 43 Wn. 2d 47, 260 P.2d 331 (1953); 8 J. WIGMORE, EVIDENCE § 2228(3)(a) (McNaughton rev. 1961).

14. 8 J. WIGMORE, *supra* note 13, § 2228(3)(b).

15. The two marital privileges share this rationale. A comparable "cruel trilemma" rationale underlies the self-incrimination privilege. *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964).

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cases.<sup>16</sup> It is available as long as the marriage is in effect;<sup>17</sup> separation or a pending divorce is immaterial.<sup>18</sup> The requirement of marriage is satisfied even if the wedding occurred only moments before the testimony was to be given.<sup>19</sup> The appearance of marrying in order to take advantage of the privilege is not a sufficient indication of a false union to prevent a claim of the privilege.<sup>20</sup>

The Washington courts have never been confronted with a claim of the privilege based on a fraudulent or spurious marriage, but the United States Supreme Court and federal courts have held that in such a case the privilege cannot be invoked. These courts have reasoned that where the marriage is merely a sham, there is no marital relationship to preserve.<sup>21</sup> Unless there are facts proving the marriage in the record, the defendant must offer such proof when the privilege is claimed.<sup>22</sup>

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16. *E.g.*, *Hansen v. Hansen*, 110 Wash. 276, 188 P. 460 (1920) (trust action); *Lyen v. Lyen*, 98 Wash. 498, 167 P. 1113 (1917) (alienation of affections); *Stanley v. Stanley*, 27 Wash. 570, 68 P. 187 (1902) (alienation of affections); *Speck v. Gray*, 14 Wash. 589, 45 P. 143 (1896) (seduction and alienation of affections). But the rule is not applicable to supplemental proceedings upon a judgment against community property, *Belknap v. Platter*, 54 Wash. 1, 103 P. 432 (1909), and it is not applicable to supplemental proceedings against a wife regarding a separate judgment against her husband, *Frankenthal v. Solomonson*, 20 Wash. 460, 55 P. 754 (1899).

17. *State v. Grasser*, 60 Wn. 2d 343, 374 P.2d 149 (1962). The possibility of granting marital privileges to unmarried cohabiting couples was explored and advised against in Comment, *The Husband-Wife Evidentiary Privileges: Is Marriage Really Necessary?*, 1977 ARIZ. ST. L.J. 411.

18. *State v. Moxley*, 6 Wn. App. 153, 491 P.2d 1326 (1971), *appeal denied*, 80 Wn. 2d 1004 (1972). In *State v. Grasser*, 60 Wn. 2d 343, 374 P.2d 149 (1962), Justice Finley dissented from the majority decision to apply the privilege in a nonsupport proceeding when the husband and wife had been living apart. Justice Finley argued that the privilege should not apply because there was no domestic harmony to protect. By analogy, he cited two Washington cases in which other rules based on the marriage relationship were not applied because of separation and pending divorce: *Goode v. Martinis*, 58 Wn. 2d 229, 361 P.2d 941 (1961) (wife allowed to sue husband for intentional tort); *MacKenzie v. Sellner*, 58 Wn. 2d 101, 361 P.2d 165 (1961) (no community liability for tort of spouse). Although the argument against applying the privilege in the face of separation and pending divorce is sound because it is doubtful there is much of a marriage to protect, it has never been accepted by Washington courts.

19. *Fortun v. McCrea*, 19 Wn. App. 7, 573 P.2d 815 (1978).

20. *State v. McGinty*, 14 Wn. 2d 71, 126 P.2d 1086 (1942); *Fortun v. McCrea*, 19 Wn. App. 7, 573 P.2d 815 (1978).

21. See *Lutwak v. United States*, 344 U.S. 604 (1953) (prosecution for conspiracy to defraud the United States against three aliens who entered into spurious foreign marriages with American veterans for the sole purpose of qualifying for entry under the War Brides Act); *United States v. Apodaca*, 522 F.2d 568 (10th Cir. 1975) (marriage was fraudulent, spurious and in bad faith); *United States v. Graham*, 87 F. Supp. 237 (E.D. Mich. 1949) (defendant husband had fraudulently induced marriage).

22. *State v. Frye*, 45 Wash. 645, 89 P. 170 (1907) (motion to strike is appropriate when evidence of marriage appears during the witness's testimony); *State v. Falsetta*, 43 Wash. 159, 86 P. 168 (1906) (privilege denied because of insufficient proof of marriage).



### C. *Spouse Declarations to a Third Person*

The Washington courts have advanced the principle that actions and past statements of a spouse cannot be offered in evidence in such a way as to circumvent the statute.<sup>23</sup> This principle proscribes testimony by a third person regarding declarations made by the spouse of a party to that third person,<sup>24</sup> including declarations made before marriage.<sup>25</sup> Such testimony would amount to the statements of one spouse being used against the other despite the use of a third-person mouthpiece.<sup>26</sup> However, if such declarations were made to third persons with the knowledge and consent of the objecting spouse, the privilege is deemed waived.<sup>27</sup>

23. *Lyen v. Lyen*, 98 Wash. 498, 167 P. 1113 (1917) (husband's deposition could not be used without wife's consent in her suit against his parents for alienation of affections); *State v. Winnett*, 48 Wash. 93, 92 P. 904 (1907) (reversible error for state to call defendant's obviously pregnant wife into the courtroom for purposes of identification when the fact in issue was pregnancy). However, this principle has not been extended to the point of prohibiting the introduction of relevant and material evidence simply because refutation of such evidence would require the spouse to be a witness. *State v. Kosanke*, 23 Wn. 2d 211, 160 P.2d 541 (1945).

24. *State v. Thorne*, 43 Wn. 2d 47, 260 P.2d 331 (1953); *State v. Clark*, 26 Wn. 2d 160, 173 P.2d 189 (1946); *Jones v. Jones*, 96 Wash. 172, 164 P. 757 (1917). It has been suggested that *Jones* and *Clark* overruled any cases prohibiting third person testimony of spouse declarations. 5 R. MEISENHOLDER, *supra* note 7, § 164. However, a careful reading of these cases reveals that they upheld the instant rule.

The court in *Jones* ruled as to the admissibility of two separate sets of declarations by a husband whose wife was suing his parents for alienation of affections. The first set of declarations was composed of statements made by the husband to his wife in her sister's presence to the effect that his father had interfered. The court held that this was admissible without making its reasoning clear. However, neither of the marital privileges would prohibit the statements. The husband was not a party so the testimony privilege did not apply, and the statements did not qualify as privileged communications because of the presence of a third person. See Part IV-D *infra*. The second set was composed of declarations made by the husband to third persons prior to the marriage regarding his feelings for his wife. The plaintiff wife objected. The court upheld the instant rule and prohibited this testimony as an attempt to evade the spouse testimony privilege.

The controversial evidence in *Clark* consisted of declarations made to a police officer during interrogation of a husband and wife who were being jointly prosecuted for murder. Each spouse objected that admission of the other's declarations through testimony by the police officer would circumvent the statute. The court approvingly cited the instant rule, but found that the privilege had been waived because the declarations had been made with the knowledge and consent of the other spouse. The rule prohibiting testimony of spouse declarations to third persons is not unique to Washington courts. C. MCCORMICK, *supra* note 3, § 66; 8 J. WIGMORE, *supra* note 13, § 2232.

25. *Jones v. Jones*, 96 Wash. 172, 164 P. 757 (1917). Distinguishing between premarital and postmarital statements would be illogical since in either case one spouse is being used against the other and the marital relationship is equally endangered.

26. This rule serves the purpose of protecting the marriage from discord. However, the trilemma rationale does not apply since the spouse would not be called as a witness.

27. *State v. Clark*, 26 Wn. 2d 160, 173 P.2d 189 (1946). The court found that separate admissions by the husband and wife were free and voluntary and given with each other's knowledge and consent. However, the court expressed serious doubt that the

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It is important to distinguish declarations made by a party's spouse to a third person from declarations made by one spouse to the other spouse which are overheard by a third person.<sup>28</sup> The rule does not prohibit a third person's testimony as to overheard interspousal communications because such statements were not made *to* a third person.<sup>29</sup> The admission of this testimony, however, is not reconcilable with the policy to guard against circumvention of the statute. It amounts to the use of the statements of one spouse against the other.

### D. Objection and Waiver

Prior to 1959, a Washington judge could require a party to object to the calling of her spouse as a witness in front of the jury even though she had made an earlier objection.<sup>30</sup> Some courts disapproved of this practice as a circumvention of the statute and prejudicial misconduct.<sup>31</sup> This disapproval became law in 1959 when the Washington Supreme Court held that admission of spouse testimony was re-

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statements of either spouse implicated the other, but indicated that if the evidence of guilt had been slight, it might have inquired "as to the possible effect of the evidence under consideration." *Id.* at 169, 173 P.2d at 194. The dissenting justice objected that admission of this testimony rendered the statutory provision nugatory since the privilege clearly applied. *Id.* at 170, 173 P.2d at 194 (Millard, J., dissenting). The holding in *Clark* may be read narrowly. Both husband and wife knew of and consented to the admissions of the other to a police officer. Since these facts offer some support for a finding of implied consent to use the statements in court, the ruling might be limited to such a situation. It could be argued that allowing third person testimony under this rule would not jeopardize the marriage because the party spouse would have known of and consented to the statement before trial, but this argument rests on the erroneous assumption that the making of the statement rather than its use in court is disruptive to the relationship. Similarly, consenting to a statement being made cannot be construed fairly as consenting to its use in court. *See also* note 24 *supra*.

28. *See* *State v. Thorne*, 43 Wn. 2d 47, 260 P.2d 331 (1953).

29. Certain fact situations involving third persons can be confusing because of the different effect of third persons on the applicability of the two privileges. A declaration to a third person is excluded by the spouse testimony privilege, yet interception of an otherwise privileged interspousal communication by a third person renders that communication admissible. The interplay of these rules was dealt with by the court in *State v. Thorne*, 43 Wn. 2d 47, 260 P.2d 331 (1953). The *Thorne* court admitted the testimony of police officers as to statements made in their presence by the defendant's wife accusing him of molesting his daughter. Defendant successfully prevented his wife from testifying by claiming the testimony privilege, but the court rejected an argument that admission of the police officer's testimony constituted circumvention of the statute. It upheld the rule that declarations to third parties are excluded by the spouse testimony privilege, but stated that "testimony by third parties who have overheard a conversation between a husband and wife is not barred either as a confidential communication or by the marital privilege." *Id.* at 57, 260 P.2d at 337.

30. *See* *State v. McWhinney*, 23 Wn. 2d 334, 161 P.2d 162 (1945).

31. *State v. McGinty*, 14 Wn. 2d 71, 126 P.2d 1086 (1942); *State v. Winnett*, 48 Wash. 93, 92 P. 904 (1907).

versible error when an objection had been made prior to the impaneling of the jury, even though the objection had not been repeated at the time of testimony.<sup>32</sup> The court reasoned that requiring the party spouse to object before the jury amounted to a constitutionally prohibited compulsion of self-incrimination. Comments on defendant's exercise of the privilege are prejudicial error.<sup>33</sup>

The testimony privilege is personal to the party spouse<sup>34</sup> and is subject to waiver. Waiver is implied when the party spouse fails to object when the witness spouse takes the stand.<sup>35</sup> The court may infer waiver of the privilege as to certain declarations made to a third person without affecting the general claim of the privilege when those declarations were made with the knowledge and consent of the objecting spouse.<sup>36</sup>

#### IV. MARITAL COMMUNICATIONS PRIVILEGE

##### A. Policy Rationales

The statutory rule is simply that neither spouse can be examined in court without the consent of the other as to any communication that occurred between them during marriage.<sup>37</sup> However, the statute is not taken literally and has been judicially modified. The policy rationales

32. *State v. Tanner*, 54 Wn. 2d 535, 341 P.2d 869 (1959) (defendant made a pretrial objection to calling the wife as a witness and objected to portions of her testimony while she was on the stand as privileged communications). The original Proposed Federal Rules of Evidence, which included privilege rules, required that, to the extent practicable, such claims be made without the knowledge of the jury. PROPOSED FED. R. EVID. 513(b) (not enacted), 56 F.R.D. 183, 260 (1972).

33. *State v. Gant*, 6 Wn. App. 263, 492 P.2d 571 (1971); *State v. Swan*, 25 Wn. 2d 319, 171 P.2d 222 (1946). See 8 J. WIGMORE, *supra* note 13, § 2243.

34. *State v. McGinty*, 14 Wn. 2d 72, 126 P.2d 1086 (1942); *Williamson v. Williamson*, 183 Wash. 71, 48 P.2d 588, *adhered to*, 185 Wash. 707, 54 P.2d 1215 (1935); *State v. Frye*, 45 Wash. 645, 89 P. 170 (1907). The statute clearly confers the privilege on the party spouse. See note 1 *supra*. A few jurisdictions recognize a privilege in the witness spouse not to testify against the party spouse. 8 J. WIGMORE, *supra* note 13, § 2241; e.g., CAL. EVID. CODE § 970 (West 1966); see text accompanying notes 142-144 *infra*.

35. *State v. Clark*, 26 Wn. 2d 160, 173 P.2d 189 (1946); *Williamson v. Williamson*, 183 Wash. 71, 48 P.2d 588, *adhered to*, 185 Wash. 707, 54 P.2d 1215 (1935).

36. *State v. Clark*, 26 Wn. 2d 160, 173 P.2d 189 (1946).

37. WASH. REV. CODE § 5.60.060(1) (1976), reproduced in note 1 *supra*. There are no cases suggesting that a communication would not be privileged because of separation or pending divorce. There is no reason why estranged spouses should not be assured of confidentiality. Free exchange may promote reconciliation. The statutory language supports the conclusion that separation and pending divorce have no effect. This would be in harmony with the rule that the spouse testimony privilege is not affected by separation or pending divorce. See note 18 and accompanying text *supra*.

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behind this privilege are completely different from those underlying the spouse testimony privilege. Marital communications are accorded a privileged status in order to promote "that free interchange of confidences that is necessary for mutual understanding and trust."<sup>38</sup> The privilege is not designed to preserve an existing relationship, but rather to encourage spouses to confide freely in each other without the fear that their statements may be used against them at some later time.<sup>39</sup> Since such communications are privileged by virtue of being interspousal, the privilege survives death or divorce.<sup>40</sup>

### B. *Communications Induced by the Marriage Relationship*

A communication must have been induced by the marriage relationship to fall within the communications privilege.<sup>41</sup> The exact meaning of this requirement is unclear, but it operates to withhold privileged status from a communication which is cruel or abusive of the other spouse. The Washington Supreme Court has stated the rule twice; both cases involved crimes committed by one spouse against the other. The fact that the communication was not induced by the marriage relationship was decisive in only one case.<sup>42</sup> In the other case the court stated that the rule would have been decisive but the testimony was admissible without using the rule because an exception was applicable.<sup>43</sup> The two "communications" were a threat of mur-

38. *State v. Thorne*, 43 Wn. 2d 47, 55, 260 P.2d 331, 336 (1953). See 8 J. WIGMORE, *supra* note 13, § 2337.

39. Analogous rationales underlie the privileged status of communications between attorney and client, 8 J. WIGMORE, *supra* note 13, § 2291; physician and patient, *id.* § 2380(a); and priest and penitent, *id.* § 2396. For a general discussion, see *id.* § 2285. These rationales are contrasted with the marital communications rationale in the text accompanying notes 116 & 117 *infra*.

40. *State v. Thorne*, 43 Wn. 2d 47, 260 P.2d 331 (1953).

41. *State v. Americk*, 42 Wn. 2d 504, 256 P.2d 278 (1953).

42. *Id.* The cases cited by the court in *Americk* are not clearly supportive. The court cited two Washington cases: *State v. Robbins*, 35 Wn. 2d 389, 213 P.2d 310 (1950), and *State v. Snyder*, 84 Wash. 485, 147 P. 38 (1915). Both of these cases speak of communications induced by the confidentiality of the marital relationship. Arguably, even beating one's wife is induced by the confidentiality of the relationship. *Americk* can best be understood as a refusal by the court to accept the injustice of forbidding the former wife's testimony. The applicability of the exception regarding crimes by one spouse against the other in *Americk* is discussed in the text accompanying note 86 *infra*.

43. *State v. Moxley*, 6 Wn. App. 153, 491 P.2d 1326 (1971), *appeal denied*, 80 Wn. 2d 1004 (1972). The *Moxley* court did not discuss the reasoning behind the rule, but merely cited *State v. Americk*, 42 Wn. 2d 504, 256 P.2d 278 (1953). The court applied the exception regarding crimes committed by one spouse against the other. See note 78 *infra*.

der<sup>44</sup> and a husband's beatings of his wife.<sup>45</sup> Apparently only communications which are extremely cruel or abusive will be denied privileged status for failing to satisfy the induced-by-the-relationship requirement.<sup>46</sup>

### C. *Acts as Communications*

On its face, the privilege only covers communication by word or gesture from one spouse to another.<sup>47</sup> However, the Washington Supreme Court has held that the privilege also applies to acts which would not have been done by one spouse before the other but for the marital confidentiality between them.<sup>48</sup> The basic principle behind this rule seems to be that freedom to act is as critical to confidentiality in marriage as freedom to speak.<sup>49</sup> This rule does not prohibit the witness spouse's testimony as to her own acts or as to facts as they existed at the time of marriage which were within her own knowledge.<sup>50</sup> It is

44. *State v. Moxley*, 6 Wn. App. 153, 491 P.2d 1326 (1971), *appeal denied*, 80 Wn. 2d 1004 (1972).

45. *State v. Americk*, 42 Wn. 2d 504, 256 P.2d 278 (1953).

46. Because the only two cases which have mentioned the rule involved prosecution for a crime by one spouse against the other, the rule may be read narrowly to apply only to similar situations. If the rule is this narrow it will rarely be invoked since the exception regarding crimes by one spouse against the other usually applies in such circumstances. See Part V-B *infra*.

47. 8 J. WIGMORE, *supra* note 13, § 2337.

48. *State v. Robbins*, 35 Wn. 2d 389, 213 P.2d 310 (1950). The defendant's former wife's testimony that he waited in the stolen car while she was applying for license plates and a certificate was held inadmissible due to the communications privilege. Application of the privilege to acts was first announced in *Robbins*. The *Robbins* court cited *State v. Snyder*, 84 Wash. 485, 147 P. 38 (1915), but the *Snyder* court merely implied that acts induced by the marriage relation might constitute confidential communications. Many states apply the privilege to acts. C. McCORMICK, *supra* note 3, § 79. In *State v. Hermes*, 71 Wn. 2d 56, 426 P.2d 494 (1967), the defendant unsuccessfully argued that the privilege applies to anything which occurred during marriage which would not have occurred had the parties not been married, specifically the former wife's testimony that she had opened defendant's mail. No states seem to have gone this far but many have chosen to grant a privileged status to any information obtained through observation during marriage, for example, mental and physical states and habits of the objecting spouse. C. McCORMICK, *supra* note 3, § 79.

49. This rule is sound in principle. As the Advisory Committee for the Federal Rules of Evidence pointed out, the marriage relationship differs from the other relationships protected by communication privileges in that it involves much more than verbal exchange. PROPOSED FED. R. EVID. 505 (not enacted), Advisory Comm. Note, Subdivision (a), 56 F.R.D. 183, 246 (1972). Therefore, granting privileged status to acts performed in reliance on marital confidence is in keeping with the policy of promoting confidentiality in marriage. However, the rule is subject to criticism: admittedly it stretches the meaning of "communication" and unnecessarily extends the statute resulting in the exclusion of relevant evidence. 5 R. MEISENHOLDER, *supra* note 7, § 181.

50. *State v. Hermes*, 71 Wn. 2d 56, 426 P.2d 494 (1967) (former wife allowed to tes-

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of no consequence that the jury might infer from her acts that her husband did or said something.<sup>51</sup>

### D. Disclosure by a Third Person

A marital communication is privileged only if it is intended to be, and succeeds in being, confidential.<sup>52</sup> A spoken communication fails to be confidential if overheard either intentionally<sup>53</sup> or accidentally.<sup>54</sup> However, to prove that it lacked confidentiality the overhearing person must testify that the conversation was overheard.<sup>55</sup> Otherwise, the

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tify as to her statements to husband and their address at time of marriage); *State v. Robbins*, 35 Wn. 2d 389, 213 P.2d 310 (1950) (former wife allowed to testify that she obtained automobile license and certificate using false name and allowed to give dates of marriage and divorce).

51. *State v. Hermes*, 71 Wn. 2d 56, 426 P.2d 494 (1967); *State v. Robbins*, 35 Wn. 2d 389, 213 P.2d 310 (1950).

52. *State v. Grove*, 65 Wn. 2d 508, 398 P.2d 170 (1965); *State v. Fiddler*, 57 Wn. 2d 815, 360 P.2d 155 (1961); *State v. Wilder*, 12 Wn. App. 296, 529 P.2d 1109 (1974); *State v. Smyth*, 7 Wn. App. 50, 499 P.2d 63 (1972). The *Fiddler* court was the first to suggest that such communications must be intended to be confidential. Courts in earlier decisions (and one later decision) held that the privilege did not apply simply because the communication had been overheard. *State v. Barnhart*, 73 Wn. 2d 936, 442 P.2d 959 (1968); *State v. Thorne*, 43 Wn. 2d 47, 260 P.2d 331 (1953); *State v. Slater*, 36 Wn. 2d 357, 218 P.2d 329 (1950). The requirement of intent may have no decisive effect. No communication has ever been admitted that was successfully kept confidential but lacked the requisite intent, although theoretically either lack of intent or of actual confidentiality would result in denial of the privilege.

53. *State v. Thorne*, 43 Wn. 2d 47, 260 P.2d 331 (1953) (police officer was present when wife accused husband).

54. *State v. Barnhart*, 73 Wn. 2d 936, 442 P.2d 959 (1968) (defendant's conversation with his wife on sheriff's telephone was overheard by sheriff's secretary). In most jurisdictions an eavesdropper renders a confidential communication admissible. The rationales advanced on behalf of the rule are that it limits the amount of excluded relevant evidence and that persons making confidential communications should take precautions not to be overheard. C. McCORMICK, *supra* note 3, § 82. However, the eavesdropper rule is contrary to the purposes of the marital privilege; the admission of otherwise inadmissible marital communications due to an eavesdropper does not assure spouses that their confidences are protected. Consequently, the rule has been abandoned in California. See text accompanying note 148 *infra*. For similar reasons the rule was omitted from the proposed federal communications privileges. PROPOSED FED. R. EVID. 503(a)(4) (not enacted), 56 F.R.D. 183, 236 (1972) (lawyer-client); *id.* 504(a)(3), 56 F.R.D. at 241 (psychotherapist-patient); *id.* 506(a)(2), 56 F.R.D. at 247 (clergyman-consultee).

55. *Breimon v. General Motors Corp.*, 8 Wn. App. 747, 509 P.2d 398 (1973) (wife not allowed to testify that other persons present in plaintiff's hospital room overheard the conversation); see also *State v. Wilder*, 12 Wn. App. 296, 529 P.2d 1109 (1974). The *Wilder* court simply stated in passing that there was no indication that the communication was intended to be or in fact was confidential because it occurred in a crowded automobile. There is no mention of third-person testimony. The only apparent basis of the defendant's objection was that the prosecutor had committed reversible error by inquiring as to the communication. The court does not clearly identify its reason for overruling the objection.

addressee spouse would be able to deprive the speaking spouse of his privilege simply by testifying that the conversation was overheard. Written communications lack the requisite confidentiality if they are read by a third person,<sup>56</sup> apparently even if the letter is disclosed by the receiving spouse.<sup>57</sup> Logic dictates that actions in the presence of others would also lack confidential status; however, there is no Washington case directly on point.<sup>58</sup>

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56. *State v. Grove*, 65 Wn. 2d 525, 398 P.2d 170 (1965) (letter sent from prison by defendant knowing it would be censored); *State v. Fiddler*, 57 Wn. 2d 815, 360 P.2d 155 (1961) (illiterate wife had to have the letter read to her); *State v. Smyth*, 7 Wn. App. 50, 499 P.2d 63 (1972) (defendant sent letter from prison knowing it would be censored). The courts in all of these cases placed emphasis on the fact that the sender must have known it would be read by someone else.

57. *See State v. Rasmussen*, 125 Wash. 176, 215 P. 332 (1923) (letter admissible because it had been produced and offered into evidence by an officer of the state); *State v. Smyth*, 7 Wn. App. 50, 499 P.2d 63 (1972) (wife's mother testified as to contents of letter stating that her daughter had shown it to her). Neither case explicitly deals with the question of the wife's disclosure. In *Rasmussen* it is not clear how the state officer came into possession of the letter. In *Smyth* the court notes that there was no intent of confidentiality since the defendant testified that he knew all mail leaving the jail would be read. *Id.* at 53, 499 P.2d at 66. But there is no mention of the letter having been read by prison officials; the only evidence of a failure of confidentiality was testimony that the wife's mother was shown the letter.

Many states have held that disclosure due to betrayal or connivance of the spouse will not remove the privileged status. *C. McCORMICK*, *supra* note 3, § 82. Although the question is not dealt with in *Rasmussen*, the court's holding suggests that such betrayal is of no consequence in Washington. The fact that the *Smyth* court does not mention the issue buttresses this conclusion. The rationale utilized in other cases is that just as the listening spouse cannot testify in court that a conversation was overheard, he should not be able to circumvent the privilege by showing the letter to a third person. The Washington cases in effect allow such circumvention. Apparently the rule requiring testimony by the overhearing party is applicable to situations involving written communications; in both *Rasmussen* and *Smyth* the third person, not the spouse, offered the contents of the letter as evidence. These cases are supported by the idea that the writing spouse cannot reasonably rely on complete confidentiality once she has put her thoughts on paper. However, the purpose of the privilege, the promotion of marital confidentiality, is undermined by a rule which discourages confidences in written communications.

58. The court in *State v. Robbins*, 35 Wn. 2d 389, 213 P.2d 310 (1950), found that an act was privileged even though it was performed in the presence of others. The ruling is limited, however, to acts in the presence of others the significance of which would only be clear to the other spouse. The act in *Robbins* consisted of the defendant waiting in the stolen car while his wife obtained license plates and a certificate. The court reasoned that because persons passing by would not be able to link the husband's actions with his wife's actions in the nearby building, the fact that he was in plain view was of no consequence; his waiting was significant only for the wife. It would require a similar circumstance for *Robbins* to be binding. The fact that the court dealt with the issue of persons passing by implies that the presence of third persons would usually be significant. Although it might be logical to suggest that a communication or act which is comprehensible only by the wife is confidential despite the presence of others, no other cases support this idea. Instead, the general principle is that once a communication is perceived by a third person, it simply is not confidential.

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### E. Objection and Waiver

The communications privilege may only be claimed or waived by the communicating spouse.<sup>59</sup> Therefore, an addressee wife can neither testify as to confidential statements of her husband when there has been timely objection,<sup>60</sup> nor refuse to testify when there has been none.<sup>61</sup> Similarly, an objecting husband cannot prevent his wife's testimony as to her own communications to him,<sup>62</sup> although she can refuse to testify as to those communications by claiming the privilege on her own behalf. Waiver may be implied if the spouse who made the statements fails to claim the privilege,<sup>63</sup> discloses the communications outside of court,<sup>64</sup> or testifies regarding such communications.<sup>65</sup> A party who is not one of the spouses cannot claim the privilege.<sup>66</sup>

### F. Summary: The Two Privileges Contrasted

The spouse testimony and marital communications privileges differ in certain basic ways.<sup>67</sup> The spouse testimony privilege applies to any type of testimony. The communications privilege applies only to communications which are intended to be, and succeed in being, confidential. The testimony privilege bars third persons from testifying as

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59. *Swearingen v. Vik*, 51 Wn. 2d 843, 322 P.2d 876 (1958); *Breimon v. General Motors Corp.*, 8 Wn. App. 747, 509 P.2d 398 (1973). See C. McCORMICK, *supra* note 3, § 83; 8 J. WIGMORE, *supra* note 13, § 2340(1).

60. *Breimon v. General Motors Corp.*, 8 Wn. App. 747, 509 P.2d 398 (1973). The *Breimon* court noted that this rule cannot be circumvented by the wife's "bootstrap" testimony that the conversation was overheard.

61. *Swearingen v. Vik*, 51 Wn. 2d 843, 322 P.2d 876 (1958). However, the court noted that the hearing spouse can object if the evidence is offered to show that her silence at the time amounted to assent or adoption of her husband's statement. *Id.* at 848, 322 P.2d at 880.

62. *State v. Hermes*, 71 Wn. 2d 56, 426 P.2d 494 (1967); *Swearingen v. Vik*, 51 Wn. 2d 843, 322 P.2d 876 (1958). This could result in the anomalous situation of a spouse testifying as to all remarks she made during a conversation, omitting the remarks of the spouse claiming the privilege.

63. *Sackman v. Thomas*, 24 Wash. 660, 64 P. 819 (1901) (failure to object more specifically than "incompetent, irrelevant and immaterial" constituted waiver).

64. *Swearingen v. Vik*, 51 Wn. 2d 843, 848, 322 P.2d 876, 880 (1958) (dictum) ("extra-judicial disclosure") (quoting 8 J. WIGMORE, *supra* note 13, § 2340).

65. *Id.* Plaintiff had testified as to his communications to his wife. Therefore, he had waived his privilege and could not object to defendant's use of wife's testimony to impeach his testimony.

66. *Williamson v. Williamson*, 183 Wash. 71, 48 P.2d 588, *adhered to*, 185 Wash. 707, 54 P.2d 1215 (1935); *Beach v. Brown*, 20 Wash. 266, 55 P. 46 (1898). In both of these cases a nonspouse defendant sought to exclude letters written from the husband to the wife in the wife's suit for alienation of affections.

67. For a discussion of these differences. see 8 J. WIGMORE, *supra* note 13, § 2334.



to declarations by the nonparty spouse to that third person over the party spouse's objection. Yet, through the testimony of an overhearing third person, an interspousal communication can be admitted in spite of a claim of the communications privilege. Only a spouse who is a party can assert the testimony privilege, but the communications privilege can be invoked by the communicating spouse, whether a party or not.

The marriage must be in effect at the time of trial for a successful claim of the spouse testimony privilege. The testimony privilege then prohibits all testimony whether it regards acts or words before or during marriage. The communications privilege does not require that the marriage be in effect at the time of trial. However, the only testimony which it prohibits is that which regards communications between the spouses while the marriage was in effect. The communications privilege survives divorce and death, but the spouse testimony privilege does not.

Both privileges apply to the testimony of a current spouse as to a confidential marital communication made by the party spouse. The witness spouse's testimony can be prohibited altogether by invoking the testimony privilege, but the party spouse may waive this privilege by not objecting when she takes the stand. However, upon finding her testimony as to his confidential statement objectionable, he can still successfully claim the communications privilege.

In another situation both privileges might seem to prohibit the same testimony, but in fact neither would apply. By timely objection, the party spouse could claim the testimony privilege and keep his wife from testifying, but a third person could come forward to testify as to a conversation between the spouses. The party spouse might seek to assert the testimony privilege rule which prohibits third persons from testifying as to spouse declarations in an attempt to exclude his wife's statements during the conversation. However, the rule would not apply because her statements were to him, not to a third person as the rule requires. The party spouse might also seek to claim the communications privilege attempting to exclude his own statements, but the communication would lack the requisite confidentiality. Therefore, the testimony of the third person would be admissible.<sup>68</sup>

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68. See *State v. Thorne*, 43 Wn. 2d 47, 260 P.2d 331 (1953).

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### V. EXCEPTIONS

#### A. *Statutory Exceptions and Policy Rationales*

Neither the spouse testimony<sup>69</sup> nor the communications privilege<sup>70</sup> applies in certain proceedings: (1) a civil action between spouses;<sup>71</sup> (2) a criminal prosecution for a crime committed by one spouse against the other, or against a child of whom the defendant spouse is parent or guardian;<sup>72</sup> or (3) any proceeding relating to nonsupport or family desertion.<sup>73</sup> Just resolution of civil actions between spouses would be most difficult if each party could invoke the privileges. In prosecutions for crimes against a spouse or child and in nonsupport and desertion proceedings, allowing the defendant to claim the privilege, excluding crucial testimony, would often leave the injured spouse without remedy while shielding the alleged wrongdoer.<sup>74</sup> The policy rationales behind the privileges support these exceptions. In all such proceedings it is doubtful that what remains of the marriage relationship would be substantially benefited by the spouse testimony privilege. Similarly, society does not have an interest in assuring the confidentiality of communications of the wrongdoer over the objections of the injured spouse or child.<sup>75</sup> In such proceedings the witness spouse would presumably like to testify so there is no need to shield her from the dilemma.

Although, the crime-against-spouse exception has been judicially

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69. See *State v. Kephart*, 56 Wash. 561, 106 P. 165 (1910).

70. E.g., *State v. Moxley*, 6 Wn. App. 153, 491 P.2d 1326 (1971).

71. "But [the privileges] shall not apply to a civil action or proceeding by one against the other . . ." WASH. REV. CODE § 5.60.060(1) (1976).

72. "But [the privileges] shall not apply . . . to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action for a crime committed by said husband or wife against any child of whom said husband or wife is the parent or guardian." WASH. REV. CODE § 5.60.060(1) (1976).

73. "In any proceedings relating to nonsupport or family desertion the laws attaching a privilege against disclosure of communications between husband and wife shall be inapplicable and both the husband and wife shall be competent witnesses to testify to any relevant matter, including marriage and parentage." WASH. REV. CODE § 26.20.071 (1976).

74. *State v. Beltner*, 60 Wash. 397, 111 P. 344 (1910) (per curiam); *State v. Kephart*, 56 Wash. 561, 106 P. 165 (1910). The court in *Beltner* emphasized that the rationale involves particular necessity, i.e., if the privilege were applied the injured spouse would be without remedy. A general necessity, such as the absence of determinative testimony, does not warrant denial of the privilege.

75. Parallel exceptions apply to the other communications privileges. For example, the physician-patient privilege cannot be claimed in a suit for malpractice. C. McCORMICK, *supra* note 3, § 104.

defined, there has been no judicial modification of the statutory exclusion of the privilege from civil actions between spouses and non-support and desertion proceedings.

*B. Judicial Modification of the Crime-Against-Spouse Exception*

*1. Crimes of personal violence*

For either privilege to be denied in a prosecution for a crime committed against defendant's spouse, the crime must have been one of personal violence.<sup>76</sup> The Washington Supreme Court's first reading of the statute to this effect was based on the assumption that there was no legislative intent to change the common law requirement of personal violence.<sup>77</sup> It would be more logical simply to draw the line between crimes committed against the spouse and those committed against others, without the additional personal violence distinction. It is unjust to exclude evidence which is likely to be crucial to providing the injured spouse with remedy, whether the crime involved personal violence or not.

Despite dubious underpinnings, the personal violence requirement has been upheld by the courts.<sup>78</sup> However, the legislature modified the requirement by adding the nonviolent crimes of nonsupport and desertion to the list of proceedings in which the privileges may not be invoked.<sup>79</sup> It is unclear whether the crime committed against a defen-

76. *State v. Grassner*, 60 Wn. 2d 343, 374 P.2d 149 (1962); *State v. Beltner*, 60 Wash. 397, 111 P. 344 (1910) (dictum); *State v. Kephart*, 56 Wash. 561, 106 P. 165 (1910); *State v. Moxley*, 6 Wn. App. 153, 491 P.2d 1326 (1971).

77. *State v. Kephart*, 56 Wash. 561, 106 P. 165 (1910). Defendant's wife was not allowed to testify in the arson prosecution of her husband for burning her barn. The *Kephart* court backed up its rejection of the state's argument for a literal reading of the statute by discussing with approval the common law basis of competency. This was inappropriate since a privilege rather than competency was in question. The court also weakly argued that without the limitation to crimes of personal violence, the exception would be appropriate for all cases. The most apparent reason for the *Kephart* rule is a reluctance to depart from the common law, which limited the exception to cases of personal violence. *E.g.*, 1 W. BLACKSTONE, COMMENTARIES \*443.

78. See note 76 *supra*. For a discussion of use of the rule in Washington cases, see *State v. Moxley*, 6 Wn. App. 153, 491 P.2d 1326 (1971). The *Moxley* court also infers legislative approval of the personal violence rule from the legislature's failure to change the rule when it made other changes in the limitations of the privilege. *Moxley* is especially interesting because it involved arson as did *State v. Kephart*, 56 Wash. 561, 106 P. 165 (1910), and although it upheld the *Kephart* personal violence rule, the wife was allowed to testify. The court distinguished *Kephart* by saying that in *Kephart* the arson involved only the destruction of property (the wife's barn), but that in *Moxley* the defendant had committed a crime of personal violence by setting fire to the wife's house while she and her children were asleep inside.

79. WASH. REV. CODE § 26.20.071 (1976) (enacted 1963 Wash. Laws ch. 10, § 1), *re-*

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dant's child must be one of personal violence; there is no case on point. It could be argued that because the clauses regarding crime against a spouse and against a child are parallel,<sup>80</sup> and because the personal violence rule in spouse crimes was well-established when the child crimes clause was added, there was legislative intent to include the personal violence requirement in the child crimes exception.<sup>81</sup> This argument could be countered by pointing out the logical deficiencies of the personal violence rule which suggest that the rule should be limited, if not discarded altogether.

### 2. *Commission of the crime during marriage*

There are no Washington cases dealing with the question whether the crime against the spouse must have been committed during marriage for the privilege to be denied. It would not make sense to require that the crime occurred during marriage; the injustice of depriving a spouse of recourse does not vary with the time of the commission of the crime.<sup>82</sup> However, the common law rule was that the crime-against-spouse exception did not apply unless the crime was committed during marriage.<sup>83</sup> In other jurisdictions this requirement has been upheld by a literal reading of sections of statutes such as R.C.W. § 5.-60.060(1) which speak of a crime committed by one spouse against the other.<sup>84</sup> In one Washington case the privilege was upheld in a prosecution for a crime committed before marriage without mentioning

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produced in note 73 *supra*. The Act guards against rulings such as *State v. Grassner*, 60 Wn. 2d 343, 374 P.2d 149 (1963). The *Grassner* court excluded the wife's testimony in a prosecution for nonsupport because it was not a crime of personal violence.

80. See WASH. REV. CODE § 5.60.060(1) (1976), reproduced in note 72 *supra*.

81. This argument could be buttressed by the reasoning of the court in *State v. Moxley*, 6 Wn. App. 153, 491 P.2d 1326 (1971). The court inferred legislative approval of the personal violence requirement by the failure of the legislature to change the court-made rule when it added crimes against children to the exception.

82. The policy rationales behind the privileges support a rule denying the privilege when the crime was against the spouse regardless of the time of commission of the crime. The spouse testimony privilege focuses on the relationship at the time of testimony. A marriage is equally unlikely to benefit from the privilege whether the crime was committed before or during marriage. In either case, the relationship would most likely be past saving. Even if in some cases resuscitation were possible, society has a greater interest in assuring the wronged spouse recourse. Similarly, the marital communications privilege rationales do not support a distinction between premarital and post-marital crimes. Society does not have an interest in either case in assuring confidentiality at the expense of the wronged spouse.

83. *United States v. Gwynne*, 209 F. 993 (E.D. Pa. 1914).

84. *E.g.*, *Wilson v. State*, 125 Ark. 234, 188 S.W. 554 (1916); *State v. McKay*, 122 Iowa 658, 98 N.W. 510 (1904).

the exception.<sup>85</sup> The question of a crime committed after divorce arises in the context of marital communications because the communications privilege survives divorce. In the only Washington case dealing with such a fact pattern the court did not mention the exception but admitted the wife's testimony regarding the communication because it was not induced by the marriage relation and therefore was not privileged.<sup>86</sup> Rulings in other jurisdictions might lead to anticipation of a Washington ruling that only a crime occurring during marriage can trigger the exception, but the growing judicial reluctance to enforce privileges<sup>87</sup> and the absence of any policy rationale for such a limitation may lead to the opposite result.

### 3. *Crime against the other spouse*

In applying the statutory exception, the Washington courts have read "against the other [spouse]"<sup>88</sup> narrowly. The exception did not operate in a civil action for alienation of affections against an outsider for injury to the marital relation.<sup>89</sup> It also cannot be used to prevent the claiming of marital privileges in the criminal prosecution of a spouse for a crime against the marriage relation such as bigamy.<sup>90</sup> Similarly, before 1965, the exception did not apply in prosecutions for incest because the crime was not against the spouse.<sup>91</sup> The manifest injustice of excluding spouse testimony in such a case prompted the legislature to amend R.C.W. § 5.60.060(1), extending the exception to crimes committed against a child of the parent or guardian defendant.<sup>92</sup> It has been held that this extension includes crimes committed by a stepparent against a stepchild.<sup>93</sup>

### 4. *The same-criminal-transaction extension of the exception*

In contrast with past narrow judicial construction of the exception, the Washington Supreme Court, in *State v. Thompson*,<sup>94</sup> recently ex-

85. *State v. Winnett*, 48 Wash. 93, 92 P. 904 (1907).

86. *State v. Americk*, 42 Wn. 2d 504, 256 P.2d 278 (1953).

87. See, e.g., *State v. Thompson*, 88 Wn. 2d 518, 564 P.2d 315 (1977). *Thompson* is discussed in notes 94-102 and accompanying text *infra*.

88. WASH. REV. CODE § 5.60.060(1) (1976), reproduced in note 72 *supra*.

89. See *Jones v. Jones*, 96 Wash. 172, 164 P. 757 (1917).

90. *State v. Kniffen*, 44 Wash. 485, 87 P. 837 (1906).

91. *State v. Beltner*, 60 Wash. 397, 111 P. 344 (1910) (per curiam).

92. WASH. REV. CODE § 5.60.060(1) (1976) (amended 1965 Wash. Laws ch. 13, § 7), reproduced in note 72 *supra*.

93. *State v. Lounsbury*, 74 Wn. 2d 659, 445 P.2d 1917 (1968).

94. 88 Wn. 2d 518, 564 P.2d 315 (1977).

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tended the exception to allow the victim spouse to testify regarding offenses against third persons which were committed in the same criminal transaction as the crime against the spouse. The rule is not unprecedented, although it is doubtful that in other jurisdictions the acts in *Thompson* would have qualified as sufficiently related crimes.<sup>95</sup>

The most radical aspect of the *Thompson* ruling is the breadth of meaning of "same transaction." The court relied on a ruling by the New Jersey Supreme Court in *State v. Briley*<sup>96</sup> which extended the exception to apply when "there is a single criminal event in which [the wife] and others are targets or victims of the husband's criminal conduct in the totality of the integrated incident."<sup>97</sup> The criminal behavior in *Briley* clearly involved a single criminal event; the defendant assaulted his wife moments after murdering her companion. In *Thompson*, on the other hand, the defendant murdered his wife's lover at least eight hours after assaulting his wife. The *Thompson* court suggested that "the logical relationship of the crimes is more important than any immediateness of connection in time in this case."<sup>98</sup> There was a logical connection between the two crimes; three hours after the wife was assaulted she observed her husband beating the murder victim and five hours later she observed the groaning victim being dragged from the house. The emphasis on a logical, rather than temporal, relationship between the crimes gives a broad meaning to "same criminal transaction." The same-criminal-transaction rule requires that the defendant be prosecuted for both crimes,<sup>99</sup> but does not require joinder of counts.<sup>100</sup>

The *Thompson* court made only passing reference to the rationale behind its ruling: "The lack of [the wife's] testimony would definitely

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95. See, e.g., text accompanying note 136 *infra*.

96. 53 N.J. 498, 251 A.2d 442 (1969).

97. 251 A.2d at 446.

98. 88 Wn. 2d at 524, 564 P.2d at 318.

99. The requirement of prosecution is not mentioned by the *Thompson* court but is required by the statute. Other jurisdictions have also required prosecution for both crimes. *E.g.*, *Grier v. State*, 158 Ga. 321, 123 S.E. 210 (1924) (wife not allowed to testify when husband was being prosecuted only for murder of their child and not for allegedly assaulting his wife at the same time); *Robbins v. State*, 82 Tex. Crim. 650, 200 S.W. 525 (1918) (wife's dying declarations inadmissible in prosecution of husband for murder of third person because, although he allegedly murdered wife and third person at the same time, he was not prosecuted for murder of wife).

100. 88 Wn. 2d at 524, 564 P.2d at 318. The New Jersey court in *Briley* also suggested that joinder of counts is not necessary. 251 A.2d at 446.

tend toward suppression of the truth.”<sup>101</sup> This general necessity argument has historically been rejected by the courts as an insufficient ground for denial of the privilege.<sup>102</sup> The traditional rationale, the specific necessity of assuring the injured spouse of redress, would have been satisfied by allowing the wife to testify only about the assault upon her. The *Thompson* court’s rationale of avoiding suppression of the truth is consistent with the trend to admit as much relevant evidence as possible. This trend alone is not sufficient reason for denying the privilege, but it justifies extending an exception when the rationales for the privileges do not apply.

The rationales behind the spouse testimony privilege are inapplicable in a same-criminal-transaction situation. Such a situation by definition involves prosecution for a crime against the spouse. As noted in the discussion of rationales behind the crime-against-spouse exception,<sup>103</sup> once a crime has been committed against the spouse there is usually very little left of the relationship for the spouse testimony privilege to protect. The wronged spouse is not usually caught in a dilemma of perjury, contempt, or alienation of the defendant spouse since alienation has often already occurred.

The rationales underlying the marital communications privilege are not as clearly absent in the same-criminal-transaction situation. The privilege is aimed at assuring confidentiality to promote the free exchange essential to marriage. Therefore, it generally applies to interspousal communications regarding crimes committed against third persons. When the crime is against the spouse, this rationale is outweighed by the necessity of assuring relief to the injured spouse. In a prosecution for a crime committed against a third person in the course of committing a crime against the spouse, there is no problem of providing relief to the injured spouse. He will be free to testify as to marital communications during the prosecution for the crime committed against him. Therefore, in same-criminal-transaction situations, when the defendant spouse is being prosecuted for a crime against a third person, the principal communications privilege rationale applies

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101. 88 Wn. 2d at 524, 564 P.2d at 318. The *Briley* court also reasoned that its ruling was in accordance with “the obvious policy of the law to enlarge the domain of competency of witnesses and to adapt the rules of evidence to the successful development of truth.” 251 A.2d at 446.

102. E.g., *State v. Beltner*, 60 Wash. 397, 111 P. 344 (1910) (per curiam).

103. See text accompanying notes 74 & 75 *supra*.

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and there is no countervailing need to provide relief for the injured spouse.<sup>104</sup>

Despite the policy reasons for allowing the communications privilege to be claimed in same-criminal-transaction cases, an argument can be made for application of the same-criminal-transaction exception to both privileges: the trilemma is not usually present in same-criminal-transaction cases, and it would be inconsistent to allow an exception to the spouse testimony privilege but no exception to the communications privilege. In light of the above policy considerations<sup>105</sup> and the trend to admit as much relevant evidence as possible, the same-criminal-transaction rule is a reasonable extension of the crime-against-spouse exception. However, *Thompson* illustrates the problem of judicial modification of privilege law. The ruling leaves the status of privilege uncertain, especially since the holding was not the result of a carefully reasoned analysis in the context of privilege rationales.

## VI. THE FUTURE OF WASHINGTON MARITAL PRIVILEGES

### A. *The Soundness of the Privileges*

Both the spouse testimony and the marital communications privileges have been subjected to criticism. Although both privileges have their weaknesses, there appears to be great reluctance to abandon marital privileges altogether. Before the privilege rules were deleted from the Proposed Federal Rules of Evidence, the Advisory Committee had drafted a husband-wife privilege which granted only a testimony, not a communications, privilege.<sup>106</sup> The Advisory Committee in

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104. The most crucial difference between the rationales behind the two privileges is epitomized in same-criminal-transaction cases. Because the spouse testimony privilege is directed at protecting the specific marriage involved, once a crime has been committed by one spouse against the other, the rationale no longer applies. The marital communications privilege, however, is directed at marriage as an institution. A crime against a spouse is only significant in the context of this privilege because it makes it necessary to allow for remedy. The rationale is untouched; it is simply outweighed. Therefore, when the prosecution is for a crime committed against a third person in the course of committing a crime against the spouse, the principal communications privilege rationales are intact. The trilemma rationale supports both privileges and, as noted in the accompanying text, is usually inapplicable in same-criminal-transaction cases.

105. See notes 103 & 104 and accompanying text *supra*.

106. PROPOSED FED. R. EVID. 505 (not enacted), 56 F.R.D. 183, 244 (1972).



its Note did not defend its decision to preserve the testimony privilege,<sup>107</sup> but rather attacked the rationale of the communications privilege. The reluctance to deprive spouses of any privileged status has traditionally been evidenced in the opposite approach; the communications privilege has been relatively free of criticism, whereas the spouse testimony privilege has been extensively criticized.<sup>108</sup>

The traditional policy rationales behind the testimony privilege became vulnerable with the passage of time. As the policy of considering all of the facts has become central to the concept of justice, the sanctity of the marital relationship has waned.<sup>109</sup> The "natural repugnance"<sup>110</sup> one feels at the thought of one spouse being the tool of the other's defeat may not greatly outweigh the "natural repugnance" one feels at letting a guilty person be shielded.<sup>111</sup> Similarly, the desire to preserve a presumed marital harmony and to protect a witness spouse from the dilemma is less compelling when pitted against the modern predilection for considering all relevant evidence.

Nevertheless, the testimony privilege has advantages. It is not subject to definition problems, such as, "What constitutes a communication?" The privilege serves its intended purpose; testimony by one spouse against the other is bound to disrupt the marriage. The rationale is wieldy; the applicability of the privilege in certain types of situations can be tested by determining whether enough of the relationship remains to benefit from the privilege.

The rationales behind the communications privilege have not been widely questioned. The privilege has typically been explained as being analogous to other communications privileges. Wigmore named four criteria as the policy foundation of all communications privileges:

- (1) The communications originate in confidence. (2) The confidence is essential to the relation. (3) The relation is a proper object of en-

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107. Ironically, after listing the policy rationales behind the spouse testimony privilege, the Advisory Committee cited Wigmore, one of the most vociferous critics of the privilege. PROPOSED FED. R. EVID. 505 (not enacted), Advisory Comm. Note, 56 F.R.D. 183, 245 (1972).

108. Compare 8 J. WIGMORE, *supra* note 13, § 2228 (spouse testimony), with *id.* § 2332 (marital communications).

109. As early as 1929, changes in the nature of the marital relationship were advanced as a reason for abandoning the privilege. Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675, 679 (1929).

110. 8 J. WIGMORE, *supra* note 13, § 2228.

111. The privilege has been defended on the grounds that the testimony of one spouse against the other is a morally reprehensible betrayal. Comment, *The Search for "Reason and Experience" Under the Funk Doctrine*, 17 U. CHI. L. REV. 525, 530 n.37 (1950).

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couragement by the law. And (4) the injury that would inure to it by disclosure is probably greater than the benefit that would result in the judicial investigation of the truth.<sup>112</sup>

The first and third criteria are satisfied by the marital communications privilege,<sup>113</sup> but analysis in terms of the second and fourth criteria reveals the theoretical weakness of the privilege. Confidentiality in marriage is essential but it is more than doubtful that assurance of the nondisclosure of spousal communications plays a major role in encouraging free exchange in marriage. Wigmore acknowledged the argument that the absence of a communications privilege would not perceptibly affect the extent to which spouses exchange confidences.<sup>114</sup> However, Wigmore chose to support the privilege since the other criteria were satisfied and because "the compulsory disclosure of marital secrets at least might cast a cloud upon an essential aspect of the institution of marriage."<sup>115</sup> Wigmore's cavalier treatment of the second and fourth criteria is troublesome. The weighing of the effect of disclosure on the relationship against the effect of secrecy on the truth-finding process is the crucial test of the validity of a communications privilege. The Advisory Committee of the Federal Rules of Evidence considered the role of privileged confidentiality in marriage. In support of its decision to exclude marital communications from its proposed privileges, the Committee concluded that it cannot "be assumed that marital conduct will be affected by a privilege for confidential communications of whose existence the parties in all likelihood are unaware,"<sup>116</sup> or, in Wigmore's

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112. 8 J. WIGMORE, *supra* note 13, § 2332, at 642.

113. For the first criterion to be satisfied it must be assumed that the privilege is only applied to communications which are intended to be confidential, not simply those which are in fact confidential. Washington law requires confidential intent. *See* note 52 and accompanying text *supra*.

114. 8 J. WIGMORE, *supra* note 13, § 2332. *See also* Hutchins & Slesinger, *supra* note 109, at 680-82.

115. 8 J. WIGMORE, *supra* note 13, § 2332. Wigmore considered the first three criteria to be "fully satisfied." *Id.* He was apparently convinced that the confidence that spousal communications would not be disclosed is essential to marriage. It is not clear how Wigmore could have considered the confidence to be essential and yet accepted the possibility that the marriage relation would not be significantly injured by disclosure. Yet this is the position he adopted when he suggested that all of the criteria except the fourth were fully satisfied. It is difficult to separate the second and fourth criteria. The more consistent view is that this confidence is not essential to the relation and therefore it will not be significantly injured by denial of the privilege.

116. PROPOSED FED. R. EVID. 505 (not enacted), Advisory Comm. Note, 56 F.R.D. 183, 245-46 (1972). The Washington courts, however, cling to this assumption. *E.g.*, *Breimon v. General Motors Corp.*, 8 Wn. App. 747, 509 P.2d 398 (1973).

terms, that injury would not inure to the institution of marriage by allowing testimony regarding marital communications.

The Committee contrasted the marriage relationship with the other protected relationships of lawyer-client, psychoanalyst-patient, and priest-penitent which "have as one party a professional person who can be expected to inform the other of the existence of the privilege."<sup>117</sup> The Committee also noted that the privileged professional relationships are almost exclusively verbal, unlike marriage. Similarly, the professional privileges protect isolated consultations whereas the marital privilege insulates an expansive range of statements and acts.

In addition to Wigmore's list, two other criteria have been advanced in support of privileged communications. It has been suggested that even though the relationship may not be harmed by revelation, the privacy involved should be protected.<sup>118</sup> The privacy of the marriage relationship is revered in American law,<sup>119</sup> and denial of either privilege results in an invasion of marital privacy. Avoidance of the trilemma of perjury, contempt, or betrayal is a sixth criterion to consider in analyzing such privileges. The trilemma rationale clearly applies to the spouse testimony privilege, but is less persuasive in support of the communications privilege invoked after divorce since the trilemma is less difficult or even nonexistent for a former spouse.

Judicial reluctance to exclude relevant evidence because of these privileges is evident in decisions like *State v. Thompson* which extended the exception rule.<sup>120</sup> But the courts also hesitate to set aside established judge-made privilege rules even though they rest on logically flimsy foundations.<sup>121</sup> Legislative reconsideration and clarification of these privileges would be timely and appropriate.<sup>122</sup> The drafters of the Proposed Washington Rules of Evidence suggested that the legislature rather than the courts should make the policy determi-

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117. PROPOSED FED. R. EVID. 505 (not enacted), Advisory Comm. Note, 56 F.R.D. 183, 246 (1972).

118. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 113 (1956).

119. E.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

120. 88 Wn. 2d 518, 564 P.2d 315 (1977). See Part V-B-4 *supra*.

121. E.g., *State v. Moxley*, 6 Wn. App. 153, 491 P.2d 1326 (1971) (acknowledged the crime of personal violence requirement for the crime-against-spouse exception).

122. Justice Utter dissented in *Thompson* on the grounds that the legislature had changed the exception rule in the past, and the court should not "step into this policy-making arena." 88 Wn. 2d at 533, 564 P.2d at 323.

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nations involved in creating or changing privileges<sup>123</sup> and declined to include privileges in the new set of rules. The drafters of the Washington rules noted that currently the detailed rules of the privileges "can be determined by reference to decisional law,"<sup>124</sup> but gleaning the rules from case law is cumbersome and often unsatisfactory. The logical defects and the age of many of the rulings weaken their reliability, especially in light of the judicial inclination to modify privilege rules.<sup>125</sup> The established judicial rules need to be scrutinized and either codified or abandoned.<sup>126</sup>

### B. *The Federal Model*

The husband-wife privilege of the Proposed Federal Rules of Evidence provides a well-reasoned model.<sup>127</sup> The proposed privilege rules were not adopted as part of the Federal Rules of Evidence because Congress chose to leave privileges to the states.<sup>128</sup> However, the proposed rules are available for the states to adopt along with those which were finally ratified as the federal rules. The proposed husband-wife privilege is a narrow spouse testimony privilege. It provides that in a criminal proceeding either the accused or the spouse of the accused can assert the right of the accused to prevent her spouse from testifying against her.<sup>129</sup> In three situations the proposed privilege would not apply: (1) a crime against the person or property of the spouse or a child of either, or a crime against the person or property of a third person committed in the course of committing a crime against the spouse; (2) spouse testimony concerning matters that occurred prior to marriage; and (3) a crime involving importation or interstate transportation of females for immoral purposes or similar offenses.<sup>130</sup>

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123. PROPOSED WASH. R. EVID. 501, Comment 501 (1977).

124. *Id.*

125. *See, e.g.,* Part V-B *supra*.

126. Court-made rules which warrant special scrutiny are (1) acts may constitute confidential communications; (2) a declaration to a third person with the knowledge and consent of the objecting spouse is not protected by the testimony privilege; and (3) only crimes of personal violence evoke the crime-against-spouse exception.

127. PROPOSED FED. R. EVID. 505 (not enacted), 56 F.R.D. 183, 244 (1972).

128. H.R. REP. NO. 650, 93d Cong., 2d Sess. 8-9, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7075, 7082-83.

129. The authority of the spouse to claim the accused's privilege is presumed absent contrary evidence. PROPOSED FED. R. EVID. 505(b) (not enacted), 56 F.R.D. 183, 244 (1972).

130. PROPOSED FED. R. EVID. 505(c) (not enacted), 56 F.R.D. 183, 244-45 (1972).

If Washington were to adopt the approach of the proposed federal rule, the most radical change would be abandonment of the communications privilege. No marital privilege would be available after divorce or in a proceeding in which neither spouse were a party. The proposed federal rule is narrower than the existing Washington spouse testimony privilege. The federal privilege is limited to criminal proceedings. The Committee did not reconcile this limitation with the policy rationales behind the privilege: prevention of marital discord and avoidance of the repugnancy of requiring one spouse to be the tool of the other's defeat.<sup>131</sup> The rationales are equally applicable in civil and criminal proceedings.<sup>132</sup> The federal privilege provides a narrower scope than the current Washington rule by allowing testimony by third persons as to statements made to them by the spouse whose testimony is prohibited.<sup>133</sup>

The crime-against-spouse exception to the proposed privilege does not differ greatly from existing Washington law; however, it does not require a crime of personal violence. Abandonment of the personal violence requirement would be laudable since that rule often results in unjust deprivation of remedy for a spouse whose property has been injured.<sup>134</sup> The federal rule exception of a crime committed against a third person "in the course of committing a crime against the other [spouse]"<sup>135</sup> is similar to the same-transaction rule of *State v. Thompson*,<sup>136</sup> but the federal rule probably requires a temporal concurrence that is narrower than the *Thompson* test.

Adoption of the second exception to the federal privilege would further narrow the existing Washington rule. The Advisory Committee chose to limit the privilege to testimony regarding matters occurring during marriage in order to prevent marrying for the purpose of suppressing testimony. Again, the Committee did not reconcile this limitation with the privilege rationales. When a marriage is in fact

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131. These two rationales were noted by the Advisory Committee. PROPOSED FED. R. EVID. 505 (not enacted), Advisory Comm. Note, 56 F.R.D. 183, 246 (1972).

132. It would be unrealistic to contend that spouse testimony resulting in a \$100,000 civil judgment would be less disruptive to the marriage than spouse testimony resulting in a one-year suspended sentence. Nonetheless, the majority of jurisdictions make this distinction. C. McCORMICK, *supra* note 3, § 66.

133. See Part III-C *supra*.

134. See Part V-B-1 *supra*.

135. PROPOSED FED. R. EVID. 505(c)(1) (not enacted), 56 F.R.D. 183, 244 (1972).

136. 88 Wn. 2d 518, 564 P.2d 315 (1977). See notes 96-98 and accompanying text *supra*.

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solely for the purpose of suppressing evidence, the rationales do not apply. However, the broad sweep of the rule would deny the privilege to all married persons whenever the testimony were directed to premarital occurrences.<sup>137</sup> The readiness of the Committee to override the rationales in order to prevent misuse of the privilege reflects a desire to limit the privilege as much as possible.

The third exception would deny the privilege in prosecutions for the transportation of women for immoral purposes.<sup>138</sup> The exception was included as an extension of Congressional policy in dealing with such offenses.<sup>139</sup> In the context of the privilege rationales, this exception implies that persons engaged in these criminal activities do not have much of a marriage to protect because of the nature of the crime.<sup>140</sup>

The proposed federal privilege rule is a reasonable compromise. It does not abandon marital privileges altogether, but only retains a narrow testimony privilege. Reducing the range of excluded evidence makes the idea of a marital privilege more palatable;<sup>141</sup> however, the Washington legislature may not wish to excise one of the privileges completely.

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137. The alternative remedy is a rule simply denying the privilege when the marriage was undertaken solely to avoid testimony. The proof problems inherent in such a rule would be difficult and rarely would such a marriage occur without at least some genuine affection between the parties. The traditional rule of denying the privilege only where the marriage was truly a sham seems to be the most reasonable. See note 21 and accompanying text *supra*.

138. The privilege could not be claimed "in proceedings in which a spouse is charged with importing an alien for prostitution or other immoral purpose in violation of 8 U.S.C. § 1328 [1976], with transporting a female in interstate commerce for immoral purposes or other offense in violation of 18 U.S.C. §§ 2421-2424 [1976], or with violation of other similar statutes." PROPOSED FED. R. EVID. 505(c)(3) (not enacted), 56 F.R.D. 183, 245 (1972).

139. The Advisory Committee found evidence of this policy in the specific, statutory denial of the privilege by Congress in prosecutions for importing aliens for immoral purposes. 8 U.S.C. § 1328 (1976). No such provision was included in the Mann Act regarding interstate transportation of women for immoral purposes, and the Supreme Court has held that the privilege applies in Mann Act prosecutions. *Hawkins v. United States*, 358 U.S. 74 (1958). The proposed exception was aimed at achieving consistency between these two types of prosecutions. PROPOSED FED. R. EVID. 505 (not enacted), Advisory Comm. Note, 56 F.R.D. 183, 246 (1972).

140. The Committee suggested that the Congressional policy was "based upon a more realistic appraisal of the marriage relationship in cases of this kind" than a policy which would allow the privilege. PROPOSED FED. R. EVID. 505 (not enacted), Advisory Comm. Note, 56 F.R.D. 183, 246 (1972). However, it seems presumptuous to assume that such a relationship cannot constitute a viable marriage.

141. In terms of Wigmore's fourth criterion, the more limited the privilege, the less it interferes with judicial investigation of truth. See notes 112-16 and accompanying text *supra*.

### C. *The California Model*

The California Evidence Code limits the marital privileges with numerous exceptions without abandoning either privilege entirely. It serves as a useful model to contrast with the proposed federal privilege. The California Code names three marital privileges: (1) a privilege not to testify against one's spouse in any proceeding,<sup>142</sup> (2) a privilege not to be called as a witness in any proceeding to which one's spouse is a party,<sup>143</sup> and (3) a privilege during and after marriage to refuse to disclose or to prevent another from disclosing a confidential communication made during marriage between one's self and one's spouse.<sup>144</sup>

The most notable difference between the Washington and California laws is that the testimony privilege in California may only be claimed by the witness spouse. This allocation is in harmony with the privilege rationales. It is doubtful that when a spouse wants to testify, the marriage is one which would benefit from the state's effort to shelter it from discord. The California privilege also protects the witness spouse from the dilemma of perjury, contempt, or betrayal of the other spouse.

The privilege of a spouse not to be called as a witness goes beyond existing Washington case law which only prohibits the calling of a spouse after the objection of the party spouse.<sup>145</sup> The California law prohibits calling the witness spouse "without the prior express consent of the [witness] spouse unless the party calling the spouse does so in good faith without knowledge of the marital relationship;"<sup>146</sup> no prior claim of the privilege is required.

The California marital communications privilege is similar to the Washington privilege with several modifications. Both spouses hold the California privilege whereas in Washington only the communicating spouse holds the privilege.<sup>147</sup> In California, the privilege may be asserted to prevent anyone from testifying, but in Washington testi-

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142. CAL. EVID. CODE § 970 (West 1966).

143. *Id.* § 971.

144. *Id.* § 980.

145. See note 32 and accompanying text *supra*.

146. CAL. EVID. CODE § 971 (West 1966).

147. In Washington a husband can always testify as to his own utterances to his wife. If she claims the privilege he simply cannot report what she said. See notes 59-62 and accompanying text *supra*. In California, he can not reveal his confidential communications to her over her objection.

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mony by eavesdroppers is not barred by the communications privilege.<sup>148</sup> The California Code denies the privilege in a number of situations including a criminal proceeding for a crime committed by one spouse against the other or the child of either.<sup>149</sup> The exception is not limited to crimes of personal violence; the statute expressly refers to crimes "against the person or property of the other."<sup>150</sup> The problem of a crime against the marriage relation not constituting a crime against the spouse is resolved by explicitly denying the privilege in prosecutions for bigamy.<sup>151</sup> The statute also expressly includes a same-criminal-transaction rule,<sup>152</sup> and notes that the crime-against-spouse exception applies to crimes committed before or during marriage.<sup>153</sup> The sections of the California Code dealing with the crime-against-spouse exception are an example of a clear and complete privilege statute.<sup>154</sup> Detailed provisions guard against judicial policymaking and provide consistency and predictability.

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148. As noted earlier, the eavesdropper rule is illogical and contrary to the privilege rationales. See note 54 and accompanying text *supra*.

149. CAL. EVID. CODE § 972(e)(1) (West 1966). In California, as in Washington, in addition to the crime-against-spouse exception, the privileges are not available in civil actions between spouses, *id.* § 972(a), and proceedings for nonsupport and desertion, *id.* § 972(e)(4). California also denies both privileges in commitment, *id.* §§ 972(b), 982, competency, *id.* §§ 972(c), 983, and certain juvenile court proceedings, *id.* §§ 972(d), 986. The communications privilege is also denied when "the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or a fraud," *id.* § 981, and when the communication is offered into evidence by a criminal defendant who was one of the communicating spouses, *id.* § 987.

150. *Id.* § 972(e)(1) (spouse testimony); *id.* § 985(a) (marital communications).

151. *Id.* § 972(e)(3) (spouse testimony); *id.* § 985(c) (marital communications).

152. *Id.* § 972(e)(2) (spouse testimony); *id.* § 985(b) (marital communications). The rule uses the same language as the federal rules, *i.e.*, "in the course of committing a crime" against the other spouse. PROPOSED FED. R. EVID. 505(c)(1) (not enacted), 56 F.R.D. 183, 244 (1972). It is doubtful that the *Thompson* facts would have fit this language. See text accompanying note 98 *supra*.

153. *Id.* § 972(e)(1) (spouse testimony); *id.* § 985(a) (marital communications).

154. The California statute provides:

A married person does not have a privilege under this article in:

(e) A criminal proceeding in which one spouse is charged with:

(1) A crime against the person or property of the other spouse or of a child of either, whether committed before or during marriage.

(2) A crime against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse, whether committed before or during marriage.

(3) Bigamy.

(4) A crime defined by Section 270 or 270a of the Penal Code.

CAL. EVID. CODE § 972(e)(1) (West 1966).



## VII. CONCLUSION

Both the California Code of Evidence and the Proposed Federal Rules of Evidence bring to light the deficiencies of the existing Washington marital privilege law. Privilege rules should be the fruit of reasoned policy decisions without the distractions of any one factual context. Instead, the Washington rules have developed randomly according to what has happened to come before the courts. At a time when Washington is about to clarify its evidence law by adopting the Federal Rules of Evidence, it would be regrettable to leave the law of marital privileges in its current confusing and illogical state.

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